Supreme Court, U.S.
FILED
OCT 20 2004
OFFICE OF THE CLERK

No. 04-812

In The

Supreme Court of the United States

LUIS MANUEL MORALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Petitioner is entitled to appeal his sentence as imposed regardless of the appeal waiver in his plea agreement because it contained judicial factfinding that increased his sentence, violating *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004), *United States v. Fanfan*, ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___ 2004 WL 1713655 (2004), and *United States v. Booker*, ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___ 2004 WL 1713654 (2004), making it a violation of the law apart from the sentencing guidelines, an exception to his appeal waiver.

2. Petitioner should have been granted leave to supplement his appeal with *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004) because it was explanatory law vital to the decision making of the Eleventh Circuit and because the issues raised by *Blakely* had been raised upon initial appeal to the best extent available.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment below, where the Eleventh Circuit Court of Appeals:

1. Held that petitioner's waiver of appeal in the plea agreement applied despite the fact that the sentence violated the law apart from the sentencing guidelines, a condition upon which he maintained his right to appeal.

2. Denied Petitioner the ability to supplement his motion for reconsideration with *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004).

OPINION BELOW

The decision of the Eleventh Circuit appears at Appendix B to the petition and is unpublished. The Eleventh Circuit's denial of Petitioner's motion for reconsideration appears at Appendix A and is also unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided this case was May 18, 2004. The petition for rehearing was subsequently denied on July 26, 2004. The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves several statutory provisions and sections of the United States Sentencing Guidelines. The content of these relevant provisions and sections are as follows.

18 U.S.C.A. 3553(e) provides, in relevant part, as follows:

> (e) Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation of prosecution of another person who has committed an offense.

18 U.S.C.A. 3742(e) provides, in relevant part:

> (e) Upon review of the record, the court of appeals shall determine whether the sentence was (1) imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) is outside the applicable guideline range, and (A) the district court failed to provide the written statement of reasons required by section 3552(c); (B) the sentence departs from the applicable guideline range based on a factor that . . . (iii) is not justified by the facts of the case . . .

21 U.S.C. 846 provides that:

> Any person who attempts or conspires to commit any offense in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. 841(b)(1)(A) provides that:

> Any person who violates . . . this section shall be sentenced as follows . . . (1)(A) In the case of a violation involving 5 kilograms or more of a mixture or substance containing a detectable amount of coca leaves . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life.

28 U.S.C.A. 1254(1) provides, in relevant part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE AND FACTS BELOW

A. Course of Proceedings and Disposition in the Court Below

On February 25, 2003, Mr. Luis Morales, Mr. Rafael Indacochea, Mr. Abelardo Carvajal, and Ms. Esmeralda Maciel were charged in a one-count indictment in the Middle District of Florida with conspiracy to possess with intent to distribute 5 or more kilograms of cocaine, in violation of 21 U.S.C. 846 and 841(b)(1)(A). Doc. 27.[1] On May 21, 2003, Mr. Morales entered into a plea agreement, and on May 28, 2003 the Honorable Elizabeth Jenkins held a change of plea hearing. Doc. 121. In the plea, Mr.

[1] All Document cites are to the District Court Docket.

Morales waived all rights to appeal his sentence except to the extent that the sentence imposed departed from the applicable sentencing guidelines level, exceeded the statutory maximum, or violated the law apart from the sentencing guidelines. Doc. 56 at 12. On November 14, 2003, the Honorable Judge Richard Lazarra sentenced Mr. Morales to 168 months of imprisonment. Doc. 102. Judge Lazarra concluded Mr. Morales was not entitled the advantage of 'safety valve' according to the criteria set in U.S.S.G. § 5C1.2(1)-(5), nor acceptance of responsibility pursuant to U.S.S.G. § 3E1.1, and gave Mr. Morales an increase for obstruction of justice under U.S.S.G. § 3C1.1 over the objections of Defense Counsel. Doc. 102 at 46, 52-55. Mr. Morales remains incarcerated pursuant to the Judgment and Sentence imposed.

Mr. Morales filed a timely notice of appeal alleging that denial of downward departures and increase for obstruction of justice were improperly applied to his sentence. Doc. 107. On May 18, 2004, The Court of Appeals for the Eleventh Circuit denied Mr. Morales right to appeal stating that none of the issues presented fell within the purview of those he was permitted to appeal as given in the appeal waiver provision of the plea agreement. App. B. On May 28, Petitioner filed a timely motion for reconsideration followed by a motion to supplement the motion for reconsideration with this Honorable Court's decision in *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004). On July 26, 2004, The Court of Appeals for the Eleventh Circuit denied both the motion for reconsideration and the motion to supplement. App. A.

B. Statement of Facts

On January 27, 2003, Rafael Indacochea traveled from Miami, Florida to Sarasota, Florida to help finalize a cocaine transaction which Indacochea and Esmeralda Maciel brokered between Luis Morales and a confidential source (CS) working in the United States Drug Enforcement Agency (DEA). (PSR 2). Morales was to pay the CS $150,000.00 for 10 kilograms of cocaine, and the CS was then to give Indacochea $5,000.00 for his and Maciel's part in the deal. Doc. 100 at 13. When he first arrived in Sarasota, Indacochea met with the CS. (PSR 2). The two then drove together to a second location in Sarasota where they met Morales, who had also driven from Miami. After he indicated that he was prepared to conduct the transaction, Morales followed Indacochea and the CS to a local warehouse. While the three drove to the warehouse, an associate of Morales' who had followed Morales from Miami, Abelardo Carvajal, fell into line behind the other two vehicles and followed them. When they arrived, Morales drove into the warehouse behind Indacochea and the CS while Carvajal waited outside. Carvajal continued to a nearby convenience store, where he was later arrested. *Id.* The CS introduced Morales and Indacochea to the undercover agent who provided Morales with 10 kilograms of cocaine. Morales cut into three of the ten packages and tested samples from each. He expressed some dissatisfaction with the quality of cocaine in one of the packages, but provided the undercover agent with the $150,000.00. Doc. 100 at 16; (PSR 2). During the transaction Morales indicated he was interested in conducting further transactions and that he had additional monies for doing such. Doc. 100 at 12. After the transfer of money, they arrested Morales and Indacochea. (PSR 2).

Immediately after arrest, Agent Robert Quinn, a case agent responsible for the arrest and indictment of Morales asked Morales about Carvajal. After being shown a picture of Carvajal, Morales replied that he knew Carvajal from Miami, but he had nothing to do with the drug deal. Doc. 100 at 20-22.

Morales pled to count one of the indictment on May 21, 2003. Doc. 56. In that plea agreement he agreed to assist the government in its investigation and prosecution of others, and forfeit his assets in exchange for no further charges being brought against him in regards to the conduct giving rise to his plea agreement. *Id.* In return, the government stated it would not oppose his request for a three level downward adjustment for acceptance of responsibility, a sentence at the low end of the applicable guideline range, or his request for sentence to be imposed without regard to any statutory minimum sentence. *Id.* In the plea, Morales also waived his right to appeal his sentence except for an upward departure by the sentencing judge, a sentence above the statutory maximum, or a sentence in violation of the law apart from the sentencing guidelines. *Id.*

Carvajal later pled to a lesser included offense, Morales was not required to testify. Maciel is still currently pending arrest. (PSR).

On May 29, 2003, Agent Quinn questioned Morales in a five minute interview to see if he could be of assistance in the prosecution of Carvajal. Doc. 100 at 20-22. During this interview, Morales told Agent Quinn that Carvajal had no knowledge of the drug deal and had been in Sarasota for the sole purpose of looking at a truck that the two were to co-own, the same story Carvajal had told agents

since his arrest. In this same interview, Agent Quinn inquired as to Morales' funds, specifically whether he had any other monies available for purchasing cocaine. Morales told Agent Quinn that, contrary to what he had said during the transaction, he had no other sources of funds available for drug purchases. However, Morales did have a safe deposit box in Miami that contained approximately $110,000.00. Morales contends that he earned this money from his roofing business.

During Morales' sentencing hearing, begun on September 12, 2003 and continued on November 14, 2003, a debate ensued about Morales' truthfulness due to what the Government perceives as discrepancies in his statements regarding Carvajal and the monies. Doc. 100; Doc. 116. During the hearing on September 12, 2003, Agent Quinn testified extensively about the statements given him from Morales regarding Carvajal and his personal funds. Doc. 100 at 20-23. He testified that post arrest, Morales had denied any knowledge of Carvajal's purpose of being in Sarasota, but that during their five-minute interview, Morales told of Carvajal coming to see a truck. *Id.* Carvajal contends that there was a misinterpretation of what he said and that he meant Carvajal had nothing to do with the drug transaction. Doc. 100 at 56-57. Agent Quinn further testified about discovering the safe deposit box of money after the interview, and of Morales' denial of having any other monies available to him for drug purchases. Doc. 100 at 22. Agent Quinn was asked about the presence of a Truck Trader magazine in Carvajal's automobile, but said he could not remember any specifics regarding the magazine other than its presence. Doc. 100 at 31. Agent Quinn stated that the post-arrest questioning and the later interview were both conducted via an interpreter, and

that, as he spoke little Spanish, he could not be certain of the exact questions posed to Morales. Doc. 100 at 28. There is no tape recording of either the post-arrest questioning or the interview. Doc. 100 at 29.

At this same hearing, Carvajal testified that he knew Mr. Morales for 20 years, that the two had plans to enter into a partnership for driving a truck, that he had been contacted by Morales days before his arrest and told they were going to see about a truck in Sarasota, and that he had no knowledge that a drug deal was about to take place. Doc. 100 at 56, 57-61. When asked by the Court, Carvajal explained that the first time he knew Morales was engaging in a drug transaction was when he was arrested, and that as far as Morales knew, he was under the impression that he was traveling to Sarasota to buy a truck. Doc. 100 at 57.

During the continued sentencing hearing on November 14, 2003, the Government recounted that during the interview on May 29, 2003, when questioned of his knowledge of the drug trade and the availability of other monies, Morales stated that he had been puffing during the transaction. Doc. 116 at 6-8. The Government argued that due to these discrepancies and the disputes surrounding Morales' knowledge of Carvajal's involvement, Morales had obstructed justice. *Id.* Petitioner argued that the discrepancies in the statements did not rise to the level of obstruction as given in the guidelines, since they did not actually obstruct or impede the investigation in any way and that there was vast uncertainty about whether Morales had actually lied about Carvajal's involvement. Doc. 116 at 9. The District Court for the Middle District of Florida agreed with the Government, sentencing Morales to 168 months in prison after denying him acceptance of

responsibility and the 'safety valve' provisions in the sentencing guidelines, and awarding an upward adjustment for obstruction of justice. Doc. 102 at 46, 52-55.

The Court of Appeals for the Eleventh Circuit denied Petitioner's appeal, finding that the appeal waiver applied, leaving Morales with no ability to appeal his sentence. App. B. The court then further denied reconsidering this earlier decision and Petitioner's motion to supplement the motion for reconsideration with *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004), stating that the issue had not been properly raised on initial appeal. App. A.

SUMMARY OF THE ARGUMENT

In imposing a sentence containing enhancements, the district court violated the law as explained in *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004), thereby violating the law apart from the sentencing guidelines, permitting Petitioner to appeal his sentence despite his appeal waiver.

The circuit split existing about whether or not *Blakely v. Washington* applies to the Federal Sentencing Guidelines will lead to disparities in sentencing between similarly situated defendants. As such, the Eleventh Circuit erred in its denial of Petitioner's motion to supplement his motion for reconsideration with *Blakely* because it was new law explaining the application of current sentencing standards, and was raised in the initial brief to the best extent possible.

STANDARD OF REVIEW

Whether a federal defendant effectively waived his right to appeal his sentence is a question of law reviewed de novo. *United States v. Copeland*, 381 F.3d 1101, 1104 (11th Cir. 2004); *United States v. Benitez-Zapata*, 131 F.3d 1444, 1446 (1997). The district court's factual findings on the scope of the plea agreement are set aside only if clearly erroneous. *Copeland*, 381 F.3d at 1104.

The District Court's application of the guidelines to the facts is reviewed de novo. 18 U.S.C.A. 3742(e); *United States v. Martin*, 320 F.3d 1223, 1225 (11th Cir. 2003); *United States v. Uscinski*, 369 F.3d 1243, 1246 (11th Cir. 2004); U.S.S.G. § 1B1.1 et seq. However, the Court's factual findings, including those related to the imposition of sentencing enhancements, are reviewed for clear error. 18 U.S.C.A. 3742(e); *United States v. Amedeo*, 370 F.3d 1305, 1312 (11th Cir. 2004) *quoting States v. Lewis*, 115 F.3d 1531, 1536 (11th Cir. 1997); *United States v. Barakat*, 130 F.3d 1448, 1452 (11th Cir. 1997); *Uscinski*, 369 F.3d at 1246; U.S.S.G. § 1B1.1 et seq. In an appeal of a sentencing enhancement the Court of Appeals reviews de novo the District Court's interpretation and application of the guidelines. *Amedeo,* 370 F.3d at 1312.

It is at the court's discretion to award the ability for either party to file a supplemental brief to the original appeal. When new authority arises after an appellate brief is filed, the Eleventh Circuit may permit a party to submit supplemental authority on intervening decisions or new developments. *United States v. Nealy*, 232 F.3d 825, 829 (11th Cir. 2000); Fed. R. App. P. Rule 28(j).

ARGUMENT I

PETITIONER IS ENTITLED TO APPEAL HIS SENTENCE AS IMPOSED REGARDLESS OF THE APPEAL WAIVER IN HIS PLEA AGREEMENT BECAUSE IT CONTAINED JUDICIAL FACT-FINDING THAT INCREASED HIS SENTENCE, VIOLATING *BLAKELY v. WASHINGTON*, ___ U.S. ___, 124 S. Ct. 2531 (2004), *UNITED STATES v. FANFAN*, ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___ 2004 WL 1713655 (2004), AND *UNITED STATES v. BOOKER*, ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___ 2004 WL 1713654 (2004), MAKING IT A VIOLATION OF THE LAW APART FROM THE SENTENCING GUIDELINES, AN EXCEPTION TO HIS APPEAL WAIVER.

Essentially, Petitioner was given a longer prison term than warranted by the bare facts of his case due to judicial fact-finding. Recently, this Honorable Court stated that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury. *Blakely*, 124 S. Ct. at 2536. Currently there are cases pending before this Honorable Court to determine the constitutionality of judicial fact-finding pertaining to sentencing when the final sentence does not exceed the statutory maximum. *United States v. Fanfan*, ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___ 2004 WL 1713655 (2004); *United States v. Booker*, ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___ 2004 WL 1713654 (2004). Even though here the sentence given Petitioner was not beyond the statutory maximum of life imprisonment, the District Judge violated the basic tenants of *Blakely*, *Fanfan*, and *Booker* when he, and not a jury, found by a preponderance of the evidence that enhancements applied to Petitioner's sentence.

In *Apprendi v. New Jersey*, this Honorable Court explained that aside from prior convictions, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), *see also Blakely*, 124 S. Ct. at 2536. The "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but what he may impose without finding any additional facts. *Blakely*, 124 S. Ct. at 2537. The Eleventh Circuit has explained that the maximum sentence, for purposes of defendant's Sixth Amendment right to jury trial, is the maximum given in the United States Code for the offense, and not the top range listed in the Federal Sentencing Guidelines for the offense prior to enhancement due to judicial fact-finding. *United States v. Reese*, ___ F.3d ___, 17 Fla. L. Weekly Fed. C 996 (2004).

The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment or found by a jury. *Apprendi*, 530 U.S. at 476. A sentencing judge exceeds his judicial authority when he imposes a punishment not based on facts found by a jury. *Blakely*, 124 S. Ct. at 2537. However, this is not to say that sentence enhancements cannot be sought. The Government may seek sentence enhancements, but only so long as the defendant stipulates to the relevant facts or consents to judicial fact-finding. *Id.* at 2541; *Duncan v. Louisiana*, 391 U.S. 145, 158, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968). In cases where there are no sentencing enhancements, that is, no factual findings by the judge increasing the sentence, there is no Sixth Amendment violation in applying the sentencing guidelines. *United States v. Booker*, 375 F.3d 508, 515 (7th Cir. 2004).

When Petitioner signed the plea, he entered into an agreement whereby he was to be sentenced for only one crime: the violation of 21 U.S.C. 846 and 841(b)(1)(A). Doc. 27. This carried with it a statutory maximum of life imprisonment. With Petitioner's lack of criminal history, he landed on the guidelines at a base level of 32, delegating a range of 121-151 months in prison. In this same plea, it was agreed that unless contrary information arose, there would be no governmental opposition to his request for several downward departures, specifically for acceptance of responsibility under U.S.S.G. § 3E1.1, substantial assistance U.S.S.G. § 5K1.1 and 18 U.S.C.A. 3553(e), and application of the 'safety valve' provision as explained in U.S.S.G. § 5C1.2. Doc. 27. Petitioner acted accordingly, accepting full responsibility for his actions and telling all he knew of the cocaine deal and the involvement of others. Due to this adherence to the agreement, Petitioner thought he was facing a base level of 27, delegating a range of 70-87 months in prison. During sentencing, however, the agreement to not oppose Petitioners' application for downward departures was broken when the Prosecution challenged his truthfulness and assistance during the investigation. Petitioner was then faced with the judge rather than a jury of his peers making factual decisions regarding his involvement in the cocaine deal and his truthfulness afterwards. At sentencing, the Prosecution presented testimony and evidence supporting their contentions that Petitioner had not, in fact, told the truth, and that he had obstructed justice. It was solely up to the District Judge to determine the weight of the evidence and what exactly it indicated. The District Judge denied downward departures for acceptance of responsibility and the 'safety valve', and applied a two level enhancement to Petitioner's sentence for obstruction of justice. Petitioner

now faced a base level of 34, or a range of 151-188 months in prison.

In his plea, Petitioner stipulated to the facts related to the violation of 21 U.S.C. 846 and 841(b)(1)(A), but did not stipulate to the facts supporting the enhancements. Doc. 27. Rather, the facts supporting the enhancements were hotly disputed during sentencing. Doc. 100; Doc. 116. Because of this, the Government did not have the right to seek the sentence enhancements, and the District Judge did not have the ability to determine their weight and credibility, as per *Blakely*, *Fanfan*, and *Booker*. The enhancements applied to Petitioner's sentence were therefore applied in contravention to the principles set out in *Blakely*, *Fanfan*, and *Booker*.

In one swift move by the District Judge, Petitioner faced a longer prison term than what he expected. Because of factual determinations made by the District Judge, enhancements were applied to his sentence raising it from a level 32 to 34. This is exactly the situation that this Honorable Court found in *Blakely*, *Fanfan,* and *Booker* to be unconstitutional under the Sixth Amendment, making Petitioner's sentence a violation of the law apart from the sentencing guidelines. This is not a debate about the actual decisions of the District Judge, or his decision to believe one defendant over another in determining who was telling the truth. It is a debate about his ability to make that factual decision at all during sentencing, rather than sending the disputed issue to a jury. Under *Blakely*, *Fanfan*, and *Booker*, the District Judge did not have this ability, and as such the sentence he imposed on Petitioner was illegal. Because of this violation of *Blakely*, *Fanfan* and *Booker*, Petitioner's sentence is appealable under the third exception to his appeal waiver in the plea agreement.

ARGUMENT II

PETITIONER SHOULD HAVE BEEN GRANTED LEAVE TO SUPPLEMENT HIS APPEAL WITH *BLAKELY v. WASHINGTON*, ___ U.S. ___, 124 S. Ct. 2531 (2004) BECAUSE IT WAS EXPLANATORY LAW VITAL TO THE DECISION MAKING OF THE ELEVENTH CIRCUIT AND BECAUSE THE ISSUES RAISED BY *BLAKELY* HAD BEEN RAISED UPON INITIAL APPEAL.

Typically, parties must submit all issues on appeal in their initial briefs. *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000); Fed. R. App. P. Rule 28(a)(5). Issues and contentions not timely raised on appeal are deemed abandoned. *United States v. Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001). However, if a new authority arises after an appellate brief is filed, the Rules of Appellate Procedure permit the citation of supplemental authorities:

> If pertinent and significant authority come to a party's attention after the party's brief has been filed . . . a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. Fed. R. App. P. Rule 28(j).

The Eleventh Circuit permits parties to submit supplemental authority on intervening decisions or new developments regarding issues already properly raised in the initial briefs. *Nealy*, 232 F.3d at 830. However, if the issue has not already been properly raised, parties cannot raise new issues at supplemental briefing, even if the issues arise based on intervening decisions or new developments. *United States v. Padilla-Reyes*, 247 F.3d 1158, 1164 (11th Cir. 2001); *United States v. Levy*, 379 F.3d 1241, 1242 (11th Cir. 2004); *United States v. Ardley*, 242 F.3d 989, 990 (11th

Cir. 2001). In its own rules, this Honorable Court permits a party to supplement its brief on new matters. Supreme Court Rule 15.8 (2003).

Because it changed the manner in which sentences had traditionally been imposed within the circuit, *Blakely* contains explanatory law essential to assisting the Court in making its decision. This Honorable Court in *Blakely* stated that *Blakely* did not take fact finding out of the court's hands. *Blakely*, at 2536. The Eleventh Circuit asserted its indecision as to whether Blakely applied to the sentencing guidelines on August 18, 2004, stating that "neither the Supreme Court nor this Circuit has resolved the issue of whether Blakely applies to the Federal Sentencing Guidelines." *United States v. Duncan*, 381 F.3d 1070, 1075 (11th Cir. 2004). In the Eleventh Circuit, therefore, *Blakely* is not new law, but a statement conciliating questions about the judicial discretion in applying the sentencing guidelines. Because the sentencing guidelines were left intact, there is no new law to be implemented, just an explanation of how to implement current rules and regulations surrounding sentencing. The same is true for *Fanfan* and *Booker*; these cases do not create new law on how sentencing should proceed, but instead explain limitations on the current methods of judicial discretion exercised during sentencing. There is discrepancy among the Federal Circuits as to whether or not *Blakely* applies to the federal sentencing guidelines. The Seventh Circuit has stated that *Blakely* applies to sentences imposed under the Federal Sentencing Guidelines. *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004). The Ninth Circuit held Blakely applies to sentences imposed under the Federal Sentencing Guidelines. *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004). The Eight Circuit has gone

further holding that Blakely rendered the Federal Sentencing Guidelines unconstitutional. *United States v. Mooney*, 2004 WL 163960 (8th Cir. 2004). Contrary to this, the Fifth Circuit has held that Blakely does not apply to the Federal Sentencing Guidelines. *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004), the Fourth Circuit, as well, has held that *Blakely* did not invalidate an appellant's sentence. *United States v. Hammoud*, 378 F.3d 426 (4th Cir. 2004).

These discrepancies between the Circuits confuse the understanding of whether, when an individual is sentenced with enhancements applied after discretionary judicial fact-finding, *Blakely* is an appropriate remedy. If one circuit considers *Blakely* to invalidate the guidelines, and another takes no stance on the issue, as has the Eleventh Circuit, it will lead to discrepancies in sentencing between similarly situated defendants, the exact opposite of the purpose of the sentencing guidelines and what this Honorable Court upheld in *Blakely*. U.S.S.G. § 1A1.1(3). Certiorari should be granted so that Petitioner's claim may be utilized to clarify these discrepancies.

Here, Petitioner's motion to supplement his motion for reconsideration with *Blakely* was denied because the issue was not properly raised in the initial brief. The Court directed Petitioner to see *United States v. Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001) (holding that issues not timely raised in briefs on appeal of federal conviction are deemed abandoned), *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001) (remand by Supreme Court in light of *Apprendi* did not require Court of Appeals to treat the case as though the issue had been timely raised before it, and thus did not preclude the court from considering the issued abandoned), and *United States v. Nealy*, 232 F.3d

825, 830 (11th Cir. 2000) (new issue raised in supplemental briefing according to new law was deemed to be abandoned after issue was not presented in trial or initial brief, and that when new authority arises the Eleventh Circuit permits supplemental briefs on new decisions previously raised in initial briefs). Petitioner filed the motion to supplement with extremely new law, filing the motion on July 15, 2004 for law created on June 24, 2004. Petitioner's brief raised three issues

1. The District Court erred in its application of a two level increase pursuant to 3C1.1 for obstruction of justice.

2. The District Court erred when it failed to grant the Defendant a three level decrease for acceptance of responsibility.

3. The District Court erred when it failed to grant the Defendant the advantages of safety valve.

The brief generally debated the District Judge's application of sentencing enhancements, a debate encompassing the sentencing guidelines and judicial discretion. In the initial appeal, Petitioner stated that "[I]n cases in which the defendant challenges the factual basis of the enhancement, the Government has the burden of establishing the fact by a preponderance of the evidence," and "the government cannot meet its burden of proof for an enhancement." Several times Petitioner pointed to the need for the government to satisfy a burden when proving that an enhancement fit. This directly relates to the statements made by *Blakely*, *Fanfan*, and *Booker* about the ability of the government to apply for enhancements before a judge when there is no jury to determine whether or not the government has met that burden. *Blakely* is not completely

new law because it does not invalidate the sentencing guidelines, but instead expands and explains the role of judicial fact-finding during sentencing. *Blakely*, 124 S. Ct. at 2538. (This Honorable Court stating "The Federal Guidelines are not before us, and we express no opinion on them"). *Blakely* is a cohesive statement encompassing all of the disputes presented in Petitioner's appeal. The issue was, in fact, raised in Petitioner's initial appeal, but not by specifically stating *Blakely* or giving its citation because *Blakely* did not exist at the time of the brief.

The Eleventh Circuit has previously denied motions to supplement briefs with *Blakely*. *See United States v. Hembree*, 381 F.3d 1109, 1110 (11th Cir. 2004) (holding that motion for leave to file substitute principal brief for purpose of raising *Blakely* error was a motion to file a supplemental brief, and thus denied upon rule forbidding parties from raising new issues by supplemental briefs); *United States v. Curtis*, 380 F.3d 1308, 1310 (11th Cir. 2004) (holding that defendant waived, as issue on appeal, *Blakely* claim where defendant had not raised any issue regarding his sentence in his initial or reply brief, but sought to file a supplemental brief prior to the decision on the merits of his appeal).

In denying defendants the ability to supplement briefs with *Blakely*, the Eleventh Circuit treats *Blakely* as new law that would effectively inject a new issue into any new appeal. But *Blakely* is, in reality, not new law but a means of thinking of the manner in which old sentencing methods were implemented. It is a guide for judges in the future on just how far their discretion extends. Because it did not reinvent application of the guidelines, but instead explained their application, the subject of Petitioner's brief, *Blakely* was not a new issue attempted to be raised upon

supplemental pleadings but instead new intervening authority conciliating traditional thoughts about the Federal Sentencing Guidelines. The attempt to add *Blakely* to Petitioner's motion for reconsideration was to give to the Eleventh Circuit a cohesive statement to assist in its decision making. Due to this, Petitioner should have been permitted to supplement his motion for reconsideration with the explanations set out in *Blakely*.

CONCLUSION

This Court should grant review of this case to decide an important question currently in dispute among the Federal Circuit Courts of Appeal.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-16108-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

versus

LUIS MORALES,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Jul. 26, 2004)

BEFORE CARNES, HULL and RONEY, Circuit Judges.

BY THE COURT:

Appellant Luis Morales' motion for reconsideration of this Court's May 18, 2004 order dismissing the appeal based on his appeal waiver is denied.

Appellant Luis Morales' motion to supplement his motion for reconsideration to *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004), is denied. *See United States v. Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001); *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir.

2001); *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-16108
Non-Argument Calendar

D. C. Docket No. 03-16108

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS MORALES,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(Filed May 18, 2004)

BEFORE CARNES, HULL and RONEY, Circuit Judges.

PER CURIAM:

Luis Morales appeals his 168-month sentence based on a guilty plea, for conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A). The government filed a motion to dismiss on the ground that Morales had waived his right to appeal.

He makes three arguments on appeal: (1) the district court improperly imposed a two-level enhancement pursuant to U.S.S.G. § 3C1.1 for obstruction of justice; (2) the district court improperly denied his request for a two-level reduction for acceptance of responsibility pursuant to § 3E1.1; and (3) the district court should have applied the "safety valve" provision pursuant to § 5C1.5.

Morales entered into a plea agreement with the United States to the indictment in which he agreed to plead guilty and waive his right to appeal his sentence except for an upward departure from applicable sentencing guidelines, or the sentence exceeded the statutory maximum, or violated the law apart from the sentencing guidelines:

> [T]he defendant ... expressly waives the right to appeal defendant's sentence, directly or collaterally, on any ground, including the applicability of the "safety valve" provisions contained in 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2, except for an upward departure by the sentencing judge, a sentence above the statutory maximum, or a sentence in violation of the law apart from the sentencing guidelines[.]

At the change of plea hearing, the magistrate carefully reviewed with Morales the appeal waiver provision of the plea agreement, which Morales stated that he understood. He thus knowingly and voluntarily waived his right to appeal all issues except those enumerated in the appeal waiver provision of the plea agreement. None of the three issues presented by Morales in this appeal fall within the

purview of those permitted to be appealed in the appeal waiver provision of the plea agreement.

APPEAL DISMISSED.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

LUIS MORALES

JUDGMENT IN A CRIMINAL CASE
(*For Offenses Committed On or After November 1, 1987*)

CASE NUMBER: 8:03-cr-83-T-26EAJ

Defendant's Attorney:
Richard Escobar (ret.)

(Filed Nov. 14, 2003)

THE DEFENDANT:

XX pleaded guilty to count One (1) of the Indictment.

____ was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846 and 341(b)(1)(A)	Conspiracy to Possess with Intent to Distribute 5 Kilograms or More of Cocaine	January 27, 2003	One (1)

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform act of 1984 and the Mandatory Victims Restitution Act of 1996.

___ The defendant has been found not guilty on count(s)
___ Count(s) (*is*)(*are*) *dismissed* on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.
594-17-3495

Defendant's Date of Birth:
August 4, 1967

Defendant's USM No.:
40858-018

Defendant's Mailing Address:
18801 Belle View Drive
Miami, FL 33157

Defendant's Residence Address:
Same as above

Date of Imposition of Sentence:
November 14, 2003

/s/ Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

Date: November 14, 2003

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **ONE HUNDRED SIXTY-EIGHT (168) MONTHS** as to Count One (1) of the Indictment.

XX The court makes the following recommendations to the Bureau of Prisons: That the defendant be placed in the Miami facility.

XX The defendant is remanded to the custody of the United States Marshal.

____ The defendant shall surrender to the United States marshal for this district.

___ at _____ a.m./p.m. on _____.

___ as notified by the United States Marshal.

____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

___ before 2 p.m. on_____

___ as notified by the United States Marshal.

___ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

United States Marshal

By: _____

Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term **FIVE (5) YEARS**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime, and shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

____ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable)

XX The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payment set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the following standard conditions that have been adopted by this court and any additional conditions on the next page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

The defendant shall also comply with the following additional conditions of supervised release:

____ The defendant shall participate in the Home Detention program for a period of ___. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by the defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such monitoring not to exceed an amount determined reasonable by the Probation Officer based on ability to pay (or availability of third party payment) and in conformance with the Probation Office's Sliding Scale for Electronic Monitoring Services.

____ The defendant shall participate as directed in a program approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency (inpatient or outpatient) which may include testing for the detection of substance use or abuse. Further, the defendant shall be required to

contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Substance Abuse Treatment Services.

___ The defendant shall participate as directed in a program of mental health treatment approved by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable to by Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Mental Health Treatment Services.

XX The defendant shall provide the Probation Officer access to any requested financial information.

XX If deported, the defendant shall not reenter the United States without the express permission of the United States Department of Homeland Security.

___ The defendant shall cooperate in the collection of DNA as directed by the Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Total Restitution
TOTALS	**$ 100.00**	**$ Waived**	**$ N/A**

The determination of restitution is deferred until ____

An *amended judgment in a criminal case* (AO 245C) will be entered after such determination.

___ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order of percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid in full prior to the United States receiving payment.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TOTALS	$_____	$_____	

___ If applicable, restitution amount ordered pursuant to plea agreement $ _____

___ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

___The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

___ the interest requirement is waived for the ___ fine and/or ___ restitution.

___ the interest requirement for the ___ fine and/or ___ restitution is modified as follows:

findings for the total amount of losses are required under Chapters 109A, 110, 110A and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. _X_ Lump sum payment due immediately

___ not later than _____ , or

___ in accordance with ___ C, ___ D or, ___ E below; or

B. ___ Payment to begin immediately and continue to make payments to the best of your ability until this obligation is satisfied. If in custody you are directed to participate in the Bureau of Prison Financial Responsibility Program if eligible, and upon your release from custody you shall adhere to a payment schedule as determined by the Probation Office.

C. ___ Payment in _____ installments of $ _____ over a period of _____ months, to commence _____days after date of this judgment

D. ___ Payment in _____ installments of $ _____ over a period of _____, to commence _____ after release from imprisonment to a term of supervision; or

E. ___ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a

period of Imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons "Inmate Financial Responsibility Program", are made to the Clerk of the Court, unless otherwise directed by the court, the Probation Officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

____ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

____ The defendant shall pay the cost of prosecution.

____ The defendant shall pay the following court cost(s):

XX The defendant shall forfeit the defendant's interest in the following property to the United States:

Any and all assets and property, or portions thereof, subject to forfeiture, which are in the possession or control of the defendant, or the defendant's nominees. These assets include but are not limited to the $155,000.00 seized on the date of arrest.

Payments shall be applied in the following order: (1) assessments; (2) restitution principal (3) restitution interest (4) fine principal; (5) community restitution (6) fine interest; (7) penalties and (8) costs, including cost of prosecution and court costs.
